Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-591

RUSSELL V. LOSING, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

Russell V. Losing, Jr., Petitioner, prays that a writ of certiorari be issued to review the judgments of the United States Court of Appeals for the Eighth Circuit, entered in this cause on July 30, 1976 and August 10, 1977. A petition for rehearing was overruled on September 21, 1977.

OPINION BELOW

The initial opinion of the Court of Appeals, dated July 30, 1976, is reported under *United States v. Losing*, 539 F.2d 1174 (8th Cir. 1976).

The final opinion of the Court of Appeals, dated August 10, 1977, is not yet reported and is attached as Appendix A. The petition for rehearing and the order overruling said petition are attached as Appendix B and Appendix C.

JURISDICTION

The final judgment of the Court of Appeals (Appendix A) was entered on August 10, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

1. Whether the United States Court of Appeals for the Eighth Circuit failed to protect Petitioner's constitutional rights under the Sixth Amendment by allowing him to proceed in an appeal without adequate representation by counsel when the Court accepted and bound Petitioner by the appeal brief filed by a co-defendant.

2. Whether Petitioner's rights to due process and a fair trial were violated by the failure of the trial court to grant a severance of defendants.

STATUTES AND RULES INVOLVED

The Constitution of the United States, Amendment V, provides:

> Amendment V. Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property
>
> ". . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law; . . ."

The Constitution of the United States, Amendment VI, provides:

> Amendment VI. Jury trial for crimes, and procedural rights
>
> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

Rule 14 of the Federal Rules of Criminal Procedure provides:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance or defendants or provide whatever other relief justice requires.

STATEMENT

Petitioner and fifteen others were charged in a 57-count indictment with violations of the Federal narcotics laws. Six of these counts were referable to Petitioner.

Count 1 charged Petitioner and others with conspiracy to violate the Federal narcotics laws; counts 7, 43, 44 and 45 charged Petitioner with using a telephone to facilitate such a conspiracy, and count 42 charged defendant and another with possession of Heroin, Schedule I.

Of the sixteen defendants originally indicted, only two remained for trial upon their pleas of not guilty: Petitioner and Donald Ray Feick. The joinder of these two defendants for trial and the denial of a severance was an issue on the appeal.

The case was tried to a jury in the District Court of Judge Kenneth Wangelin, such trial lasting four days. At that time

the jury returned a verdict finding both defendants guilty on all counts charged. On December 29, 1975, Petitioner was sentenced to terms of fifteen (15) years each under counts 1 and 42, and terms of three (3) years under counts 7, 43, 44 and 45, all to run concurrently, making a total of fifteen (15) years.

Petitioner's motion for new trial was denied and he filed a notice of appeal to the U.S. Court of Appeals for the Eighth Circuit in Case No. 76-1040. Co-defendant Feick also filed an appeal to the Eighth Circuit (Case No. 76-1045).

In December, 1976, on advice of the attorney who was at that time representing him, Petitioner signed a motion to adopt in his appeal the brief and argument which his co-defendant was using in his (Feick's) appeal. The Eighth Circuit Court of Appeals, without a hearing, granted Petitioner's attorney's motion, binding Petitioner by the brief and argument of his co-defendant. Thereafter, Petitioner's attorney neither filed any pleadings nor made any appearances to argue the appeal for the Petitioner herein.

On July 30, 1976, the Eighth Circuit Court of Appeals remanded the case to the District Court to conduct an evidentiary hearing "as to whether the Government complied with 18 U.S.C. 2518(5), and, if not, whether suppression is required." **U.S. v. Losing,** 539 F.2d 1174.

On September 9, 1976, the hearing on the issue of minimization of the tapes was held by District Judge H. Kenneth Wangelin. The government had available for such hearing 15 witnesses who participated in the monitoring of the wiretaps. Defendants' cross-examination of the second witness was suddenly stopped by the Court, who terminated the hearing without testimony from any of the other available witnesses.

Subsequent to such hearing, defendant Feick and the government each filed briefs, and again, the attorney for Petitioner

failed to file a brief or present any points for review in the protection of the Petitioner's rights. On January 20, 1977 the District Court filed a memorandum finding that "the intercept was properly conducted and there is no reason to suppress any of the evidence gained from it". The case was certified back to the Court of Appeals which, on February 2, 1977, allowed the filing of supplemental briefs by defendants. Once more, Petitioner's attorney declined to file a brief, request a hearing or, as before, adopt the brief of another.

Consequently, on August 10, 1977 (Appendix A) the Court of Appeals affirmed the judgments appealed from.

REASONS FOR GRANTING THE WRIT

1 and 2

The United States Court of Appeals for the Eighth Circuit erred when it failed to protect the Sixth Amendment rights of Petitioner by allowing him to adopt the brief of his co-defendant on appeal. By allowing Petitioner to prosecute his appeal in this manner, several meritorious points regarding prejudicial errors in the joint trial of this case were lost to him.

The Eighth Circuit Court of Appeals stated in its opinion of August 10, 1977, at page 11, that since defendant Losing had elected, on advice of counsel, to adopt his co-defendant's brief on appeal, and said brief did not discuss or show any prejudice to Losing as a result of the joint trial, Losing had failed to preserve any such issue for appeal.

The right to counsel under the Sixth Amendment has long been considered a fundamental right, *Glasser v. United States*, 315 US 60, 86 L.Ed 680, 62 S.Ct. 457 (1942). Further, that right extends from trial and through the appellate process, *Cardarella v. United States*, 375 F.2d 222 (USCA 8th 1967) cert den. 389 U.S. 882, 19 L.Ed 176, 88 S.Ct. 129. In the present case, Petitioner was denied this fundamental right because his counsel's election to rely on the brief of his co-defendant failed to preserve any chance he had to show prejudice to his case due to the fact that a joint trial was held.

It has been stated that the courts must protect the rights of persons to effective assistance of counsel. In *Kopetka v. Young*, 310 F.Supp. 1001 (D.C.Minn. 1970) the court said, at page 1004,

> (w)hat is required by the constitution to meet the dictates of due process is that representation by counsel not be

> so lacking in competence *that it becomes the duty of the court or prosecution to observe and correct the deficiencies.* Citing cases.

In the instant case, one involving charges of conspiracy, prejudice to the Sixth Amendment rights of Petitioner was immediately apparent to the Court of Appeals as shown by their previously noted observations.

In *Glasser v. United States*, supra, this court stated at page 76, that

> (I)n conspiracy cases, where the liberal rules of evidence and the wide latitude accorded to the prosecution may, and sometimes do, operate unfairly against an individual defendant, *it is especially important that he be given the benefit of undivided assistance of counsel without the courts becoming a party to encumbering that assistance.*

In *Glasser* the court was concerned with the fact that representation of co-conspirators by the same counsel had prejudiced one of said co-defendants at the trial court level. In the case at bar we have the same situation, one attorney representing two clients with at least potentially conflicting interests. The Court of Appeals, by allowing this mode of appeal, deprived Petitioner of his right to effective assistance of counsel.

It is clear that the brief which Petitioner's counsel insisted he adopt could not and did not adequately represent his interests on appeal. While it is true that appellate counsel need not brief *every* point of possible error on appeal, he has a duty to brief those which are meritorious, and should not allow obvious points to be by-passed by the court, *Cardarella v. United States*, supra, also *Harshaw v. United States*, 542 F.2d 455 (USCA 8th 1976).

Petitioner contended in his motion for rehearing to the Court of Appeals that prejudice had resulted in his case due to the

joint trial. In his original appeal these points were not made on his behalf due to the fact that the Court of Appeals allowed him to be bound by the brief of a co-defendant which did not raise these points referable to him.

For some time there has been a great deal of confusion in the cases attempting to define what constitutes effective assistance of counsel.

> Due process does not require errorless counsel, and not counsel judge ineffective by hindsight, but counsel reasonably likely to render, *and rendering*, reasonably effective assistance. *Rawlins v. Craven*, 329 F.Supp. 40, (D.C. Cal. 1971).

Here, Petitioner's counsel completely abdicated his responsibility to Petitioner by failing to protect his rights on appeal and, indeed, even failing to appear or present oral arguments.

In *Harshaw v. United States*, supra, the court said that in order to prevail on a claim of inadequate assistance of counsel, the appellant must show a breach of duty by his counsel, either by misfeasance, malfeasance, or non-feasance, and also that he was prejudiced thereby, 542 F.2d 455 at 457. Here there was clearly a breach of duty to Petitioner in the failure to file a brief properly preserving valid points for appeal. The subsequent failure of the court to consider those points on the motion for rehearing was obviously prejudicial to Petitioner.

The most frequently stated formula for determining whether or not assistance of counsel was adequate is the "farce or mockery of justice" standard. This standard of thoroughly discussed in *Cardarella*, where the court said that a claim of inadequate representation by counsel can succeed "only if it can be said that what was or was not done by defendant's attorney for his client made the proceedings a farce and a mockery of justice," 375 F.2d 222 at 230 and cases cited therein. This particular

standard is often adopted by the Federal Courts of Appeals and is explained and defined in numerous cases. See: *United States v. DeCoster*, 487 F.2d 1197, (CADC 1973); *Moore v. United States*, 432 F.2d 730 (CA 3rd 1970); *King v. Beto*, 429 F.2d 221 (CA 5th 1970); *Coles v. Peyton*, 389 F.2d 224, (CA 9th 1967); Annotation: Effective Representation by Counsel, 26 ALR Federal 218 (1976).

In the case at bar, Petitioner's counsel on appeal deliberately allowed meritorious objections to be waived and wholly failed to effectively and adequately represent Petitioner. As the Court of Appeals for the Eighth Circuit said in *United States v. Easter*, 539 F.2d 633 at 665 (1976), quoting with approval from *Robinson v. United States*, 448 F.2d 1255, 1256.

> "the circumstances must demonstrate that which amounts to a lawyer's deliberate abdication of his ethical duty to his client. There must be such conscious conduct as to render pretextual an attorney's legal obligation to fairly represent the defendant."

Here, the circumstances convincingly show that, by failing to file any brief on appeal, Petitioner's counsel ignored very deliberately the rights of his client and his duty to Petitioner because of Petitioner's financial status. This is clearly demonstrated by the instrument prepared by said counsel for Petitioner's signature requesting that he be bound by the brief of his co-defendant on appeal. See Appendix D.

Finally, it is clear that counsel for Petitioner on his initial appeal to the Eighth Circuit Court of Appeals failed to meet the standards of effective counsel set forth by that court in its opinion in the case of *Crismon v. United States*, 510 F.2d 356 (1975). In the *Crismon* case, the court states clearly at page 358 that,

> "counsel does not render effective assistance within the Sixth Amendment when he does not exercise the custom-

> ary skills and diligence that a reasonably competent attorney would perform under similar circumstances."

In the instant case an effective and reasonably competent attorney would not allow a client already prejudiced by a joint trial to go to appeal relying on the brief of a co-defendant whose presence in the original trial had contributed to the prejudice of his client's case and a co-defendant whose intent and purpose was clearly to exculpate himself at the expense of that client, the Petitioner herein.

CONCLUSION

For the reasons stated herein, I respectfully submit that the Petition should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 76-1040

United States of America,
Appellee,

v.

Russell V. Losing, Jr.,
Appellant.

No. 76-1045

United States of America,
Appellee,

v.

Donald Ray Feick,
Appellant.

Appeals from the United States District Court for the Eastern District of Missouri.

Submitted: June 14, 1976

Resubmitted: March 14, 1977

Filed: August 10, 1977

Before Van Oosterhout, Senior Circuit Judge, Lay and Henley, Circuit Judges.

Van Oosterhout, Senior Circuit Judge.

These direct criminal appeals are now before us for plenary review following proceedings in the district court pursuant to our order of partial remand dated July 30, 1976. *United States v. Losing*, 539 F.2d 1174 (8th Cir. 1976). We affirm.

In our prior opinion we held that defendants-appellants Donald Ray Feick and Russell Victor Losing, Jr., were entitled to an evidentiary hearing for the purpose of determining whether a Government wiretap complied with the minimization requirement of 18 U.S.C. § 2518(5). The district court has conducted the hearing and has certified to us its findings of fact and conclusions of law, dated January 20, 1977, to the effect that the wiretap complied with the stated requirement. The parties have filed supplemental briefs with respect to the January 20 order.

We also consider additional contentions advanced by the defendants when the appeal was originally submitted and not considered in our prior opinion. These are:

> II. The affidavit in support of the wiretap application failed to show that normal investigative procedures had been tried and failed, as required by 18 U.S.C. § 2518 (1)(c).
>
> III. Cross-examination of key Government witness Joseph Cranage was improperly restricted at trial.
>
> IV. Defense motions for severance should have been granted.
>
> V. There was insufficient evidence to sustain a conviction.

A number of the pertinent facts are set forth in our prior opinion and need not be repeated here. To the extent that additional facts are pertinent to the issues remaining for consideration, we relate them in due course.

I

The minimization hearing required under our order of partial remand was conducted by the district court on September 9, 1976. The Assistant United States Attorney and the drug enforcement agent who supervised the intercept were both extensively examined and cross-examined at the hearing. Copies of reports to Judge Regan, who authorized the wiretap initially, were introduced into evidence, as were the daily reports prepared by the supervisory agent and the log book prepared by the monitoring agents. The original tapes were similarly available to the court and the parties.

After considering the entire record, the district court found the following facts: (1) the supervising attorney gave detailed instructions to the agents who operated the wiretap that all calls of a privileged nature or "innocuous" in content were to be minimized; (2) the agents actually minimized between 79 and 81 calls; (3) the total number of *completed* calls was 1208, of which approximately 400 were drug-related and a very substantial number of those remaining were less than two to three minutes in length;[1] (4) written reports, containing a breakdown of the number of calls received, their nature, and whether they were minimized, were given to Judge Regan at five-day intervals; and (5) the objectives of the intercept had not been achieved in full when it was terminated on December 27, 1974, upon disconnection of the target telephone. The district court further noted that sixteen persons were ultimately indicted and at least fifty considered for indictment, that identifying the

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[1] With some exceptions, the agents would normally intercept approximately the first two to three minutes of a call. At least in a case such as this, where the alleged conspiracy involves numerous persons whose identity is difficult to ascertain, we are satisfied that this practice complies with the statute. *Cf. United States v. Harvey*, 540 F.2d 1345, 1351 (8th Cir. 1976) (similar practice upheld with respect to private wiretap by a telephone company pursuant to 18 U.S.C. § 2511(2)(a)(i)).

various voices and interpreting the language of the drug business presented considerable problems for the monitoring agents, and that the defendant "often mixed business with pleasure" during their telephone conversations.

Confronted with the above facts, the court below concluded:

> In this context it must be concluded that the Government's efforts at minimization were more than sufficient. In fact, as the supervising agent testified, some conversations which were minimized in part were found later to be drug-related. Certainly, some conversations were recorded that were completely "innocuous." However, considering the total number of calls intercepted and the scope of the investigation, those "innocuous" calls were far too few in number to affect the validity of the inntercept.

The fact findings detailed above are supported by substantial evidence and are not clearly erroneous, and the legal conclusion just quoted is fully consonant with the principles set forth in our prior opinion, 539 F.2d at 1180-81. The district court properly determined that the wiretap in this case complied with the minimization requirement of 18 § 2518(5).[2]

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[2] Defendants also contend that the trial court erred in terminating the minimization hearing following the testimony of two witnesses and in restricting the length of cross-examination of the second witness. As noted in our prior opinion, the extent of inquiry to be permitted at the hearing was within the trial court's discretion. 539 F.2d at 1181. Counsel for defendant Feick was permitted roughly fifty minutes of cross-examination of the second witness, slightly more than the time consumed by Government counsel on direct examination. Counsel for defendant Losing was afforded additional time for cross-examination. Redirect examination by Government counsel was not permitted. We are satisfied that the court below afforded all parties a fair opportunity to develop their arguments, that extension of the hearing would have resulted in repetition and cumulation, and that there was no abuse of discretion. See also Fed. R. Evid. 403.

II

Eighteen U.S.C. § 2518(1)(c) requires that an application for an order authorizing the interception of a wire communication include "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." Defendants contend that the wiretap application in this case, presented to Judge Regan on December 13, 1974, failed to comply with this requirement.

As noted in our prior opinion, the central figure in the drug conspiracy under investigation was Joseph Cranage. The affidavit which accompanied the wiretap application in this case explained that the Government's primary interest was to determine Cranage's source or sources of supply of controlled substances, his method of delivery and distribution, and the location or locations where his immediate supply of drugs was kept. According to the affidavit, a prior wiretap of Eugene Kirk and others[3] had revealed that Cranage was being supplied with heroin by Kirk but that Cranage had additional sources of supply for cocaine, which the Kirk wiretap had not revealed. The affidavit similarly explained that exhaustive physical surveillance and extensive records checks, details of which were related in the body of the affidavit, had proved unproductive in uncovering the desired facts. The affidavit further related that attempts to consummate an actual purchase from Cranage would likely have been futile, since Cranage would in all probability seek to ascertain the would-be purchaser's true identity prior to any sale; in any event, even if a purchase were completed, it would not disclose Cranage's distribution network.

The pertinent standards under 18 U.S.C. § 2518(1)(c) have been set out on several recent occasions by this court.

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[3] See *United States v. Kirk*, 534 F.2d 1262 (8th Cir. 1976).

United States v. Jackson, 549 F.2d 517, 537 (8th Cir. 1977); *United States v. Matya*, 541 F.2d 741, 745 (8th Cir. 1976); *United States v. Daly*, 535 F.2d 434, 438 (8th Cir. 1976); *United States v. Kirk*, 534 F.2d 1262, 1274 (8th Cir. 1976). In *United States v. Daly*, we said:

> We recognize that Congress intended these sections to restrict wiretaps to those which are necessary as well as reasonable. But Congress did not require the exhaustion of "specific" or "all possible" investigative techniques before wiretap orders could be issued. Congress prohibited wiretapping only when normal investigative techniques are *likely* to succeed *and* are not too dangerous. "Merely because a normal investigative technique is theoretically possible it does not follow that it is likely." Sections 2518 (1)(c) and 2518(3)(c) are only designed to ensure that wiretapping is "not to be routinely employed as the initial step in criminal investigation" and "* * * to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime." The Government's showing must, of course, be tested in a "practical and commonsense fashion." And as in other suppression matters, considerable discretion rests with the judge to whom the wiretap application is made.

535 F.2d at 438 (citations omitted).

The wiretap application in this case complied with 18 U.S.C. § 2518(1)(c).

III

The primary Government witness at trial was Joseph Cranage. According to his own testimony, Cranage had been a large-scale distributor of heroin. He had, prior to the trial below, pled guilty to three counts of using a telephone in furtherance of a

drug conspiracy, had been sentenced to three-year concurrent terms, and had been paroled after eleven months. He had been assured that he would not be further prosecuted for past drug crimes, notwithstanding the fact that he was named in twenty-five counts of the indictment in this case, including the conspiracy count. He had also been given assurances of Government assistance in relocating and sustaining himself for a short time. All of these matters were thoroughly brought out on direct and especially cross-examination, and the jury was accordingly well aware of the witness' character and his reasons for testifying.

Notwithstanding the wide latitude given to defense counsel to explore the above matters on cross-examination, defendants claim that the cross-examination was improperly restricted. The primary basis for this contention is the district court's refusal to allow questioning concerning Cranage's possible participation in the murder of a Government informant. Out of the presence of the jury, defense counsel was permitted to voir dire the witness for the purpose of determining whether any deals had been made with the Government in connection with the alleged murder. When the voir dire proved unproductive in disclosing any such deals, the court ruled that questioning about the witness' speculative involvement in a murder would not be permitted, but that defense counsel remained free to examine the witness concerning any deals he had made with the Government. This ruling was well within the trial court's discretion. *United States v. Kirk*, 496 F.2d 947, 949-50 (8th Cir. 1974).

Defendant Feick further contends that the district court improperly restricted cross-examination of Cranage by inhibiting defense counsel's effort to establish that prior statements by Cranage to Government agents did not implicate Feick in illicit drug traffic. We can discern no such restriction at all. During cross-examination, Cranage first testified that he didn't recall whether his prior statements implicated Feick. When a number

of the statements were placed before him, however, he acknowledged the absence of Feick's name therein. The district court did not prevent defense counsel from using this procedure with respect to any or all of the statements, although it did rule that the statements themselves would not be received in evidence, a ruling prompted at least in part by defendant Losing's objection that his name was mentioned in the statements. Feick does not assign this ruling as error but complains instead that Cranage's responses to the effect that he didn't recall whom he had previously implicated were "vague" and that Government counsel refused to stipulate that Cranage had not previously mentioned Feick. Feick does not explain on appeal what the district court could or should have done about either of these difficulties. In any event, we find no restriction on cross-examination as alleged.

IV

Defendants contend that the Government failed to make a submissible case that a single conspiracy existed and that the district court was accordingly compelled to grant their motions for severance under *Kotteakos v. United States*, 328 U.S. 750 (1946). They emphasize that the evidence against them was separate and distinct, that (with the exception of the conspiracy count) they were not both named in any single count of the indictment, and that they didn't even know each other during the period of the indictment. A similar argument was made and rejected in *United States v. Kirk*, *supra*, 534 F.2d at 1269-72. Here, as there, the evidence, viewed in the light most favorable to the verdict, was more than sufficient for the jury to find a single conspiracy in which both defendants participated. Unlike *Kirk*, where we held jury instructions on multiple conspiracies unnecessary, the jury in this case received such instructions and it rejected defendants' contention. The district court's refusal to grant a severance under *Kotteakos* was not error.

It is axiomatic that persons charged with engaging in a conspiracy should be tried together, particularly where proof of the defendants' complicity in the conspiracy is based on the same evidence and acts. *United States v. Jackson*, *supra*, 549 F.2d at 523; *United States v. Graham*, 548 F.2d 1302, 1310 (8th Cir. 1977). Although severance will be allowed upon a showing of real prejudice to a defendant, the motion to sever is addressed to the discretion of the trial court, and a denial of severance is not grounds for reversal unless clear prejudice and an abuse of discretion are shown. *United States v. Jackson*, *supra* at 523; *United States v. Graham*, *supra* at 1310-11.

Although defendants are correct in maintaining that the proof of their complicity in the conspiracy is based largely on independent evidence and acts, we do not pause to consider whether the degree of prejudice which need be shown in that circumstance is somewhat less than would be the case if proof of their complicity were based on the same evidence and acts. Whether or not this is so, the district court still retains considerable discretion in matters of severance, and real and substantial prejudice must be shown to warrant reversal on appeal. Nothing in this case comes close to that.

Feick contends he was prejudiced when Losing's counsel questioned Cranage regarding heroin going from one C. L. Richardson to Feick. The questioning was brief and disclosed little else. Feick's defense was that he was a heroin addict who purchased heroin only for his own habit, which at times reached $300 a day. The fact that Feick may have obtained heroin from Richardson was hardly prejudicial.

Feick also contends he was prejudiced when the district court refused to permit the introduction into evidence of previous statements by Cranage which did implicate Losing and numerous other co-conspirators but which did not implicate Feick. As already noted, this problem was partially alleviated when Cran-

age acknowledged that a number of the statements omitted any mention of Feick, and Feick's counsel was free to seek similar acknowledgments with respect to the remaining statements. Moreover, we think Feick's counsel successfully made the point that numerous other persons played more prominent roles in the conspiracy than did Feick. The prejudice, if any, was *de minimis*.

Finally, Feick contends he was prejudiced by the facts that the evidence against Losing was much stronger than that against Feick, that Losing was not a heroin addict or user, and that Losing could thus offer no explanation for his drug trafficking. The argument is without merit. A defendant is not entitled to severance merely because the evidence against a co-defendant is more damaging than the evidence against him; severance becomes necessary where the proof is such that a jury could not be expected to compartmentalize the evidence as it relates to separate defendants. *United States v. Jackson, supra* at 525. It is clear that compartmentalizing the evidence in this case presented no difficulties for the jury. The offenses with which Feick and Losing were charged were, with the exception of the conspiracy charge, distinct. The defendants' respective voices appeared in separate intercepted telephone conversations. Cranage was extensively cross-examined by counsel for each defendant. Both defendants took the stand on their own behalf, and the defenses were widely divirgent. The jury instructions distinguished the two cases with considerable care. The district court's refusal to sever was not an abuse of discretion.

Losing, as noted in our prior opinion, elected to rely on Feick's brief on this appeal. Understandably, Feick's brief does not purport to demonstrate any prejudice to Losing as a result of the joint trial. Losing has accordingly failed to preserve any such issue for review. In any event, our examination of the record has uncovered no such prejudice.

V

Lastly, Feick contends there was insufficient evidence to sustain any of the convictions against him.[4] Feick was convicted on one count of conspiring, in violation of 21 U.S.C. § 846, to manufacture, distribute and dispense heroin and on four counts of using a telephone to facilitate the conspiracy, in violation of 21 U.S.C. § 843(b) and 18 U.S.C. § 2. He was sentenced to three-year concurrent terms on all convictions and to a three-year special parole on the conspiracy conviction.

We of course view the evidence in the light most favorable to the verdict and accept as established all reasonable inferences to support the conviction. *United States v. Scholle*, 553 F.2d 1109, 1118 (8th Cir. 1977). The evidence overwhelmingly established the existence of a conspiracy to distribute heroin during the time period named in the indictment. Cranage testified that he and his confederates had purchased heroin in large quantities and had distributed it to numerous persons. This testimony was not substantially disputed.

Once the existence of a conspiracy has been established, even slight evidence connecting a particular defendant to the conspiracy may constitute proof of the defendant's involvement in the scheme to render him culpable. *Id.* Feick admits he was a heroin addict and that he used the telephone to purchase heroin for his own use. He contends, however, that he was not a participant in any conspiratorial activity to supply heroin to others. The jury was instructed: "even if you believe the Defendant Feick may have violated the law by purchasing or possessing heroin, such purchase or possession is not the offense charged in the indictment and you may not find the Defendant Feick guilty on the basis of such evidence. . . ." The jury obvi-

[4] Losing has failed to preserve this issue for review. In any event, the evidence amply supported his convictions.

ously rejected Feick's defense. There was ample evidentiary basis for its doing so.

Cranage testified on at least four occasions that Feick distributed heroin.[5] In addition, the telephone conversations which formed the basis of the substantive charges against Feick reveal efforts by Feick to purchase heroin with Cranage and other conspirators, in one case with the expressed intention (in Cranage's words) to "deal off most of it." Although the series of conversations with Cranage apparently did not result in a purchase, let alone a subsequent sale, the conversations are unquestionably probative of Feick's alleged role in the conspiracy.[6] The evidence was accordingly sufficient to permit the jury to discredit Feick's testimony that he was a mere user.

Each of the remaining arguments raised by Feick with respect to the conspiracy charge concerns interpretation of the evidence adduced at trial. In no instance can we say that the Government failed to make a submissible case.

We are similarly satisfied that each of the telephone conversations which formed the basis of the substantive charges against Feick under § 843(b) was sufficient to make out a submissible case that Feick used the telephone to facilitate the conspiracy. Feick contends that § 843(b) should not be construed

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[5] Transcript at 374: "For a period of time [Feick was a user and an addict and I was selling drugs to him]. Then the relationship changed and he went into distribution."

Transcript at 375: "[Feick] was buying from Tom Kimbel and reselling and he offered to sell to me on numerous occasions."

Transcript at 376: "[Feick] was using more and more drugs, yes, sir, and then he started to support his habit by selling."

Transcript at 385: "[Feick] went more and more into distribution."

[6] These telephone conversations all occurred during the period of time named in the conspiracy count of the indictment.

to make use of a telephone to facilitate a conspiracy a crime. The argument is without merit.

The judgments appealed from are affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

In the
United States Court of Appeals
For the Eighth Circuit

No. 76-1040

United States of America,
Appellee,

vs.

Russell V. Losing, Jr.
Appellant.

Appeal from the United States District Court
Eastern District of Missouri, Eastern Division
Hon. H. Kenneth Wangelin, Judge Presiding

PETITION FOR REHEARING AND
SUGGESTION OF APPROPRIATENESS OF
REHEARING IN BANC

DAVID C. GODFREY
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Attorney for Appellant

PETITION FOR REHEARING AND SUGGESTION OF APPROPRIATENESS OF REHEARING IN BANC

Appellant respectfully requests a rehearing in this cause, in that the Court misapprehended and overlooked the following:

I

The Court Misapprehended the Applicability of the Kirk Decision to the Issue of Severance Presented in This Appeal.

II

The Court Overlooked the Obvious Prejudice to the Appellant in the Failure of the Trial Court to Grant a Severance of Defendants.

III

The Court Overlooked the Obvious Denial of Appellant's Rights When Not Permitting Him to Offer Evidence and in Terminating the Minimization Hearing Before All of the Available Witnesses Had Testified.

IV

The Court Has Overlooked and, Therefore, Failed to Protect Appellant's Constitutional Rights by Allowing Him to Proceed in an Appeal Without Adequate Representation by Counsel When the Court Accepted and Bound, on Behalf of Appellant, the Appeal Brief Filed by a Co-Defendant.

ARGUMENT

I and II

The opinion of this Court summarily dismissed the contention of appellant that his rights were violated by the refusal of the trial court to grant a severance in this case, citing *United States v. Jackson*, 549 F.2d 523 and *United States v. Graham*, 548 F.2d 1302, 1310 (8th Cir. 1977), as well as *United States v. Kirk*, 495 F.2d 947, 949-50 (8th Cir. 1974).

The *Kirk* decision further cited another previous ruling of this Court when it stated:

> As a normal rule, severance should be allowed upon a showing of real prejudice to an individual defendant (United States v. Hutchinson, 488 F.2d 484 (8th Cir. 1973); however, "in the absence of such a showing, persons charged in a conspiracy should be tried together, especially where the proof of the charges against the defendants is based upon the *same evidence and the same acts*." (emphasis supplied)

In the instant case, although the type acts (i.e., involving narcotics) were the same, each act was individual and separate, involving separate or different phone contacts, separate transactions and different evidence. The only common denominator was the prosecution's main witness, Joseph Cranage, who was involved in separate transactions with each defendant. Appellant contends that the fact that two, otherwise unconnected, individuals have dealings with the same third party does not constitute a conspiracy.

The trial court overruled appellant's renewed motion for severance at the time of trial based upon the Government's assurances (Tr.4) that the evidence would connect defendants with each other. This was never done: at no time did the evi-

dence or the testimony of the witnesses serve to connect the actions of defendant Losing with those of defendant Feick.

As in the case of *Kotteakos v. United States*, 328 U.S. 750 (1946), what is presented here is evidence of separate and independent transactions of different individuals having no connection with each other.

The real prejudice to appellant by a joint trial can further be pointed out when one stops to consider the sheer volume of evidence introduced by the Government, only a portion of which was connected with the appellant. The jury was asked to consider 19 recorded telephone conversations, typed transcripts of which were given to the jurors, as well as the testimony of 18 government agents relating to a total of 1208 calls, of which some 400 were drug-related. When faced with such overwhelming evidence of various transactions, not shown to be connected with the acts of this appellant, it is not surprising that the jury returned a verdict of "Guilty". The dangers of justifying joint trials under the guise of a thin or nonexistent conspiracy charge were pointed out in *United States v. Branker*, 395 F.2d 881, 888-889 (2nd Cir. 1968).

Not only did the Government fail to show a connection between defendants Losing and Feick in proceeding on its conspiracy charge, it created such an atmosphere of real prejudice to appellant by the introduction of the mass of evidence which was itself not connected to appellant so as to preclude appellant from receiving a fair trial.

III

This Court has stated, in its July 30, 1976 Opinion at page 13, that "we think defendants are entitled to elicit the pertinent facts (regarding minimization of the tapes) at a hearing

and to obtain from the district court appropriate findings of fact and conclusions of law."

The premature termination of the minimization hearing by the district court precluded proper cross-examination by defendants and the opportunity to examine additional witnesses on the subject of the admissibility of the tapes. The district court did not hold a complete hearing, which was demanded by this Court, hearing just enough to satisfy itself that it had complied with this Court's order. The purpose of the order was not to just "hold a hearing" but to hold one to "elicit the pertinent facts" and determine if the trial court was justified in overruling defendants' motions to suppress the tapes.

The Government anticipated the necessity of substantiating its burden of proof at the minimization hearing and had available what it felt to be the necessary number of witnesses to sustain such burden, at least 15 by number. Yet the district court, acting on its own, precluded the defendants from having the opportunity to examine such witnesses when it prematurely terminated the hearing, further denying defendants the opportunity to offer evidence on their own behalf.

If, as the Government now contends, the burden was on defendants to substantiate their claim that the interceptions were not minimized, the Court had an even greater duty to permit defendants to bring forth all available evidence to substantiate their position.

Although recognizing that the district courts had discretion as to the extent of inquiry to be permitted during the minimization hearing (*Mulligan v. United States*, 358 F.2d 604, 608 (8th Cir. 1966)), appellant contends that the district court abused such discretion by refusing to hear all the available evidence and basing its conclusions on documents previously introduced at the trial. This being in contradiction to this Court's order to "conduct an evidentiary hearing" (July 30, 1976 Opinion, page 13).

To resolve a question of exceptional importance such as this, appellant suggests the appropriateness of determination of this cause by the Court in Banc.

IV

This Court has stated in its August 10, 1977 Opinion, at page 11, that defendant Losing elected to rely on defendant Feick's brief on this appeal, which brief did not purport to show "any prejudice to Losing as a result of the joint trial. Losing has accordingly failed to preserve any such issue for review".

Appellant, in this petition, claims that such action by the Court, in permitting his counsel to "ride the coattails" of a co-defendant to the obvious detriment of appellant's case was, in effect, the denial of his right to counsel. Had such motion been denied by the Court, appellant would have been afforded the opportunity to file proper pleadings and briefs on his behalf, preserving for review the many errors and prejudice demonstrated in the trial.

Appellant was entitled to the right of appeal. This Court, by sustaining his and his counsel's request to use and be bound by the appeal brief of a co-defendant, eliminated this right. Defendant Feick's appeal, by its very nature, would exclude the points needed to be brought out to a reviewing court on behalf of appellant and could, understandably, be expected to attempt to "shift the blame" onto appellant in an effort to gain freedom for himself (Feick). Those points in the trial transcript which were to assist defendant Feick were, in fact, "glamourized" to the detriment of appellant.

As recently and repeatedly inferred by the Supreme Court Justices, a mere license to practice law does not necessarily qualify one to properly advise and represent an individual before the higher tribunals of this country. What, in actuality, is

strongly suggested in this petition is that this Court, in granting appellant's motion, did in effect allow him to proceed without adequate representation of counsel in violation of his rights under the Sixth Amendment of the United States Constitution.

We contend that this Court has a duty to protect the rights of an individual who obviously is not being properly counselled in the most basic facets of a legal defense. This contention is further strengthened by the record on appeal, which demonstrates a total lack of personal counsel and representation of appellant, either by the filing of necessary pleadings or the appearance at time of oral arguments.

Conclusion

For the reasons stated herein, appellant respectfully requests this Court grant a rehearing in this cause. In the alternative, it is respectfully suggested that it would be appropriate for this cause to be transferred for a rehearing before the Court in Banc.

Respectfully submitted,

DAVID C. GODFREY
130 South Bemiston Avenue
Suite 502
St. Louis, Missouri 63105
(314) 721-3383
Attorney for Appellant

I hereby certify that the foregoing Petition for Rehearing and Suggestion of Appropriateness of Rehearing in Banc is submitted in good faith and believed to be meritorious.

David C. Godfrey

Certificate of Service

I hereby certify that two true copies of the foregoing Petition for Rehearing and Suggestion of Appropriateness of Rehearing in Banc were served by me on this 8th day of September, 1977, by placing the same in a postpaid envelope addressed to the United States Attorney, U.S. Courthouse, 1114 Market Street, St. Louis, Missouri 63101, and by depositing said envelope and its contents in the United States Mail in Clayton, Missouri.

David C. Godfrey

APPENDIX C

United States Court of Appeals
For the Eighth Circuit

76-1040 September Term, 1977

United States of America,
Appellee,
vs.
Russell V. Losing,
Appellant.

Appeal from the United States Court of Appeals for the Eastern District of Missouri

The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

September 21, 1977

APPENDIX D

United States Court of Appeals
For the Eighth Circuit

United States of America,
Appellee,
vs.
Russell V. Losing, Jr.,
Appellant.
No. 76-1040

Motion of Appellant, Russell V. Losing, Jr., to Adopt and Be Bound by Record, Brief and Argument in United States of America, Appellee, vs. Donald Ray Feick, Appellant, No. 76-1045

Comes Now Appellant, Russell V. Losing, Jr., and for his Motion herein, states:

1. That in the Court below, this Movant-Appellant and Donald Ray Feick, Appellant in No. 76-1045, were tried as Co-Defendants, and both were found guilty by the Jury therein.

2. That in the Court below, all rulings were made for and on behalf of both Defendants.

3. That this Appellant can neither proceed herein as a pauper, nor can he bear the expenses of an appeal.

4. That Donald Ray Feick, Appellant herein, in No. 76-1045, Movant's Co-Defendant below, is proceeding by perfecting his appeal before this Honorable Court.

5. That there are common matters of error between both Appellants, same being pretrial Motions having been overruled,

and in particular, the pretrial Motions regarding the wire taps, severance regarding matters prior to and during trial, a question of juror misconduct, restriction by the Court of cross-examination of a witness named Cranage, refusal of the Court to receive evidence to prior statements of witness, Cranage, the Court's alleged errors regarding numerous evidentiary matters and the instructions of the Court below, and that all of said matters will apply to both of the Parties named herein.

6. That this Movant desires to adopt and be bound by the designation of record, statement of issues, brief and argument of Appellant, Feick, No. 76-1045, so that in the event this Honorable Court sees fit to grant a new trial on the issues of fact and law common herein, then and in that event, this Court will further see fit to grant this Movant, based thereon, a new trial.

7. The Appellant herein states that on February 4, 1976, at the hour of 10:00 A. M. O'clock, he is voluntarily surrendering to the United States Marshal for the Eastern District of Missouri, located in St. Louis, Missouri, for the commencement of service of the sentence imposed by the Court below.

Wherefore, the premises considered, Appellant, Russell V. Losing, Jr., Movant herein, prays this Honorable Court to permit him to be bound by those matters as hereinbefore set forth, regarding United States of America, Appellee, vs. Donald Ray Feick, Appellant, No. 76-1045.

RUSSELL V. LOSING, JR.
Appellant-Movant
BERNARD STEINGER
Attorney for Russell V. Losing, Jr.
7751 Carondelet, Suite 703
Clayton, Missouri 63105
726-2131

County of St. Louis }
State of Missouri } ss.

Russell V. Losing, Jr., Appellant-Movant, having first been duly sworn, states on his oath the facts and circumstances hereinbefore set forth are true to his best knowledge and belief, and he has executed the above and foregoing as his free act and deed.

Russell V. Losing, Jr.

Subscribed and sworn to before me on this ..... day of ....., 1976.

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